STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of MARIAH DARLENE LEMOND and MICHAEL LEMOND, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

MICHAEL LEMOND,

Respondent-Appellant.

UNPUBLISHED
July 26, 2007

No. 274978
Clinton Circuit Court
Family Division
LC No. 05-018409-NA

Before: Murphy, P.J., and Zahra and Servitto, JJ.

PER CURIAM.

Respondent appeals as of right from an order terminating his parental rights to the minor children under MCL 712A.19b(3)(a)(ii) and (g). We reverse and remand for further proceedings.

Respondent argues that reversal is required because the trial court did not obtain personal jurisdiction over him, where it failed to properly serve him with notice of the initial proceedings or with notice of the petition and hearing to terminate his parental rights. "Whether a court has personal jurisdiction over a party is a question of law, which this Court reviews de novo." *In re Terry*, 240 Mich App 14, 20; 610 NW2d 563 (2000).

We shall first review the statutory provisions that are implicated. MCL 712A.12 provides a trial court with authority, on the filing of a petition, to "issue a summons . . . requiring the person or persons who have the custody or control of the child . . . to appear personally and bring the child before the court[.]" The statute continues, providing, "If the person so summoned shall be other than the parent or guardian of the child, then the parents or guardian, or both, shall also be notified of the petition and of the time and place appointed for the hearing thereon, by personal service before the hearing, except as hereinafter provided." *Id.* In *In re Mayfield*, 198 Mich App 226, 231; 497 NW2d 578 (1993), this Court, interpreting MCL 712A.12, stated that "[a]fter a . . . court determines that a petition should be authorized, a parent not having custody of a child must be served with notice of the petition and the time and place of an adjudicative hearing regarding the petition." Similarly, in the case of *In re SZ*, 262 Mich App 560, 564; 686 NW2d 520 (2004), this Court stated that, under MCL 712A.12, "[a] parent of a child who is the subject of a child protective proceeding is entitled to personal service of a summons and notice

of proceedings." MCL 712A.12 applies equally to termination petitions. *In re Terry, supra* at 21; *In re Atkins*, 237 Mich App 249, 250; 602 NW2d 594 (1999).

MCL 712A.13 provides that "[s]ervice of summons may be made anywhere in the state personally by the delivery of true copies thereof to the persons summoned." If, however, "the judge is satisfied that it is impracticable to serve personally such summons or the notice provided for in the preceding section, he may order service by registered mail addressed to their last known addresses, or by publication thereof, or both, as he may direct." *Id.*; see also *In re Adair*, 191 Mich App 710, 714; 478 NW2d 667 (1991). A trial court can consider any evidence in the record when deciding if personal service is impracticable. *In re SZ, supra* at 569. With respect to service by publication, an allowable alternate method of service when impracticability exists, jurisdiction is conferred under MCL 712A.13 when "publication is made once in some newspaper printed and circulated in the county in which said court is located at least 1 week before the time fixed in the summons or notice for the hearing."

Turning to the court rules, MCR 3.920(B)(2)(b) provides that "[i]n a child protective proceeding, a summons must be served on the respondent." Such summons "must be served by delivering the summons to the party personally." MCR 3.920(B)(4)(a). However, "[i]f the court finds, on the basis of testimony or a motion and affidavit, that personal service of the summons is impracticable or cannot be achieved, the court may by ex parte order direct that it be served in any manner reasonably calculated to give notice of the proceedings and an opportunity to be heard, including publication." MCR 3.920(B)(4)(b). We note that MCR 3.920(B)(4)(c) provides that where personal service is not required, "the court may direct that [the summons] be served in a manner reasonably calculated to provide notice." With respect to dispositional review hearings, permanency planning hearings, and termination proceedings, the court is required to provide parents with written notice. MCR 3.921(B)(2) and (3). MCR 3.977(C)(1), which court rule addresses the termination of parental rights, provides that "[n]otice must be given as provided in MCR 3.920 and MCR 3.921(B)(3) [see above]." Where a court finds probable cause to believe that an identifiable person is a child's natural father, "the court shall direct that notice be served on that person in any manner reasonably calculated to provide notice to the putative father, including publications if his whereabouts remain unknown after diligent inquiry." MCR 3.921(C)(1).

"It is well-established that a failure to follow the court rules regarding notice requirements does not establish a jurisdictional defect, although a failure to provide the applicable statutory notice would." *In re SZ, supra* at 567, citing *In re Mayfield, supra* at 230-231 and *In re Brown*, 149 Mich App 529, 540-542; 386 NW2d 577 (1986). A failure to comply with the statutory notice requirements constitutes a jurisdictional defect that renders all trial court proceedings void. *In re Atkins, supra* at 250-251; *In re Adair, supra* at 713-714; *In re Brown, supra* at 542 (orders emanating from protective proceedings are void where jurisdiction was never established).

Here, proceedings were commenced in October 2005 to take temporary custody of the children, who were in the care of their mother at the time. The children's mother voluntarily released her parental rights, and the parental rights of the father of a third child, not involved in this action, were terminated. They have not appealed. The initial petition identified respondent as the putative father of Mariah, listing his address as Davies, Indiana. The lower court record does not indicate that petitioner or the court made any effort to serve the initial petition on

respondent as required by MCL 712A.12. The children's mother was personally served with the petition, but nothing in the court file indicates that any effort was made to notify respondent of these proceedings until possibly December 2005.[1] There is nothing in the record to indicate that the court attempted to personally serve the initial petition to assume jurisdiction on respondent, or to provide notice of that petition by alternative means, i.e., registered mail or publication. While the trial court may not have originally been certain regarding whether respondent was the children's father, respondent had indeed been adjudged the children's legal father in a 2004 proceeding in Eaton County, in which a support order had been entered. Accordingly, he was legally the "father" and a "parent" under MCR 3.903(A)(7)(c) and (d) and (17); therefore, he was entitled to statutory notice. But respondent was deprived of such notice with regard to the initial petition and subsequent proceedings leading up to the termination petition, where no attempt at service (personal, registered mail, or publication) was made. This resulted in rendering these proceedings void.

Ultimately, in August 2006, the court entered an order finding probable cause that respondent was the legal father of the children. See MCR 3.921(C). However, no service, personal or alternate, of any protective proceeding documents was attempted at the time, contrary to MCR 3.921(C)(1). In October 2006, a petition to terminate parental rights was filed. Although the record reflects that petitioner filed a motion for alternate service shortly after the termination petition was filed and that the trial court granted the motion and authorized service by publication in a newspaper in Clinton County, nothing in either the lower court record or petitioner's motion indicates what efforts were made to locate respondent. Rather, petitioner's motion simply stated that respondent's whereabouts were unknown.

The record discloses, however, that the children's mother informed the court and petitioner during early proceedings that respondent was residing in Washington, Indiana. The children's mother also provided the name of respondent's mother, who would know how to contact respondent. More significantly, the record discloses that after the order terminating respondent's parental rights was entered, a copy of the order was sent to respondent at an address in Washington, Indiana, and was accepted for him by his mother. Inexplicably, there is no indication in the record of any prior attempts to locate or contact respondent at that address. After the termination order was sent to respondent, he submitted a request for court-appointed counsel.

This case is factually similar to *In re Adair, supra*. In that case, the petitioner thought the respondent was incarcerated in Virginia and an attorney who was appointed for the respondent stated at one point that she was incarcerated in West Virginia. *Id*. at 712-713. This Court held that the burden was on the petitioner to attempt to locate the respondent for purposes of serving

[1] A December 2005 proof of service suggests that documents were served by mail on respondent at the address of "Davies In." The proof of service left blank the space in which to indicate the documents that were being served, and the boxes for ordinary, certified, or registered mail are not marked or checked. Considering the incomplete nature of the proof of service and lack of a full address, we question whether any documents were actually mailed to and received by respondent. Regardless, there is no indication of service by publication or registered mail.

her with notice of the proceedings and that the trial court erred in allowing publication notice without first deciding if reasonable efforts had been made to locate the respondent. *Id.* at 714-715. This Court explained:

> While MCL 712A.13 . . . allows for alternative methods of service of process, it still requires that the trial court first determine that personal service is impracticable. Because the respondent was apparently out of the state, it would appear that personal service would be impracticable.[2] The parties refer to the fact that notice was accomplished by publication. We believe it was error for the trial court to allow only for notice by publication without first further inquiring regarding the whereabouts of respondent and attempting to determine if reasonable efforts were made to locate her by the DSS for service by certified or registered mail. Under the facts of this case, it would have been reasonable to contact the family or to make some type of inquiry to the correctional systems of West Virginia and Virginia by telephone call or letter in an effort to find respondent before resorting to substituted service, particularly publication in Wayne County alone when it was known respondent was out of the state. [*In re Adair, supra* at 714.]

In this case, petitioner had information that respondent was living in Washington, Indiana, and also had a Washington, Indiana address, which was later used to successfully notify respondent of the order terminating his parental rights. Petitioner's motion for alternate service did not identify what efforts were made to contact or locate respondent. Further, service by publication only in Clinton County was not reasonable considering that respondent was known to be living out of state. Further, it would have been reasonable to attempt service by certified or registered mail at the known address in Indiana. Under the circumstances, we conclude that the

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[2] MCL 712A.13 directs that the service of a summons "may be made anywhere *in the state* personally by the delivery of true copies . . . ." (Emphasis added.) MCR 3.920 does not contain similar language to that emphasized in the preceding sentence. Assuming that personal service outside of the state can be deemed "impracticable" under the statute solely because the personal service would have to be made outside Michigan, MCL 712A.13 indicates that alternate service by publication in a newspaper printed and circulated in the county where the court is located would suffice to confer jurisdiction. That was done here with regard to the termination documents. However, even were we to accept the above assumption, the constitutional protection of due process requires that interested parties be "given notice through a method that is reasonably calculated under the circumstances to apprise them of proceedings that may directly and adversely affect their legally protected interests and afford them an opportunity to respond." *Wortelboer v Benzie Co*, 212 Mich App 208, 218; 537 NW2d 603 (1995). In support, the *Wortelboer* panel cited the landmark case of *Mullane v Central Hanover Bank & Trust Co*, 339 US 306; 70 S Ct 652; 94 L Ed 865 (1950). *Wortelboer, supra* at 218. The panel also stated that "[n]otice by publication is sufficient to satisfy the due process requirement of notice when, under the circumstances, it is not reasonably possible or practicable to provide more adequate notice." *Id.* Here, more adequate notice than simply publication in Clinton County could have been pursued under the circumstances. Said publication was not "reasonably calculated," verbiage used in our court rules as well as in due process analysis, to apprise respondent of the termination proceedings.

trial court lacked jurisdiction to terminate respondent's parental rights, and that the procedures used in this case violated respondent's right to due process. *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976); *Mullane v Central Hanover Bank & Trust Co*, 339 US 306; 70 S Ct 652; 94 L Ed 865 (1950); *In re AMB*, 248 Mich App 144, 209; 640 NW2d 262 (2001); *Wortelboer v Benzie Co*, 212 Mich App 208, 218; 537 NW2d 603 (1995). Furthermore, the court rules, MCR 3.920, 3.921, and 3.977, were offended by the deficient notice procedures utilized in this case.

Accordingly, we reverse the order terminating respondent's parental rights and remand for further proceedings. In light of our decision, it is unnecessary to consider respondent's remaining issues.

Reversed and remanded. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Brian K. Zahra
/s/ Deborah A. Servitto